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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/882,627	06/15/2001	John G. Ciesar	5557-8	8478

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EXAMINER

ARYANPOUR, MITRA

ART UNIT	PAPER NUMBER
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3711

DATE MAILED: 03/13/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application N .

09/882,627

Applicant(s)

CIESAR ET AL.

Examiner

Mitra Aryanpour

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on 01/0320/03.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) <sup>1-21, 23-34</sup>~~1-34~~ is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) <sup>1-21, 23-34</sup>~~1-34~~ is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1, 6 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mollica (5,360,209).

Mollica shows a batting swing trainer (10) comprising: a shaft (22) having a substantially uniform circumference and first and second ends; a handle (12) attached to the first end; the second end having an area of increased circumference (28) relative to the remainder of the shaft (22); a generally cylindrical slide (20) mounted on the shaft (22) and movable between the first and second shaft ends. Mollica further shows the generally cylindrical slide is made to resemble a "somewhat traditional baseball bat". This is considered to be a broad statement, since traditional baseball bats are made in various lengths and diameters to accommodate the end user. Additionally, Mollica teaches that the weight of the slide can be varied to accommodate the various needs of the individual batters, it would have been obvious to increase or decrease the length and/or the diameter of the slide in order to adjust the weight, since the aforementioned modification would work just as well. Furthermore, as best seen in the figures, the diameter of the slide is substantially the same; means (the upper portion of 12, where 24 is housed) positioned on the shaft adjacent to the handle (12) for stopping movement of the slide in the direction of the handle (12) and a handle grip (14) for

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accommodating both of a user's hands. Mollica shows the end of 12 (away from the 16) acting as stop means. Mollica as disclosed above is silent on the subject of buffers being affixed to the slide. However, this does not mean that Mollica teaches away from it, especially since this feature is well known in the sports training art, and there is nothing unobvious about providing a buffer at either end of the slide in order to protect the hand from being pinched and to provide a means for absorbing some of the impact.

Regarding claim 6, Mollica's device meets the structural limitation of the claimed invention, therefore it is capable of being used such that a person may place one hand on the handle (12) and the other hand on the slide (20) to simulate a batting stance; and the person may simulate batting by swinging the trainer while simultaneously moving the slide along the shaft (22) from a first position adjacent the head to a second position adjacent the handle.

Regarding claim 13, Mollica shows the area of increased circumference on the second end of the shaft is a head (28) permanently affixed to the shaft(22).

**IN ADDITION:**

2. Claims 1, 6, 8, 9, 11, 13, 17, 19-21, 23, 33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kallassy (WO 99/26705).

Kallassy discloses a swing trainer device that can be used for golf and/or baseball (see page 14, lines 14-19) comprising (10): a shaft (12) having a substantially uniform circumference and first and second ends; a handle (14) attached to the first end, wherein the handle is sized to accommodate both of the user's hands; the second end having an area of increased circumference (16) relative to the remainder of the shaft (12); a slide (20) mounted on

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the shaft (12) and movable between the first and second shaft ends (see figure 1), the slide having substantially the same diameter as the handle portion; means (22) positioned on the shaft (12) adjacent to the handle (14) for stopping (see page 9, lines 1-19) movement of the slide (20) in the direction of the handle (14); additionally Kallassy shows the slide means having flared sections (24 and the protrusion on 20) acting as a buffer. Regarding the “generally cylindrical handle” limitation, Kallassy clearly teaches that various type handles can be used, and states that the handle and/or the slide can be made cylindrical-in-shape in order to avoid customizing the outer surface to fit various size hands (see page 12, lines 3-7). There is nothing unobvious about including all of these features in the baseball embodiment.

Regarding claim 6, Kallassy further teaches that a person may place one hand on the handle and the other hand on the slide to simulate a golfing, or alternatively for batting stance; and the person may simulate golfing and/or batting by swinging the trainer while simultaneously moving the slide along the shaft from a first position adjacent the head to a second position adjacent the handle (see page 9, lines 19-28; and page 10, lines 6).

Regarding claim 8, Kallassy shows the fasteners contain cooperating threaded members (see page 12, lines 24-26).

Regarding claim 9, Kallassy shows the stopping means (202) comprises a ring (the stop means is ring-shaped; see page 12, line 10 and 11) secured to the shaft (12).

Regarding claim 11, Kallassy shows the stopping means (202) is secured to the shaft by a pin (see page 12, lines 21-25). Additionally Kallassy in a preferred embodiment shown in figures 14 and 15, shows that the head is a slidable weight (330).

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Regarding claim 13, Kallassy shows the area of increased circumference (16) on the second end of the shaft is a head permanently affixed to the shaft (see page 8, lines 1 and 2).

Regarding claim 17, Kallassy further shows the head (330) is secured to the shaft by a pin (332; see page 14, lines 1-4).

Regarding claims 19 and 20, Kallassy shows the slide (20) has means on one end (24) for contacting the stopping means (22), and protecting the user's hands from being pinched (see page 9, lines 1-7); and means on the other end for contacting the head and protecting the user's hands from being pinched. Kallassy also shows buffer means (24) positioned on the end of the slide that has a diameter larger than the diameter of the slide (see page 9, lines 13-18; also see figure3).

Regarding claim 21, Kallassy further shows the contacting and protecting means are rings (see figure 5, wherein the upper and lower sections of the slide form ring-like formations) affixed to the distal ends of the slide (20)

Regarding claim 23, Kallassy shows the handle (14) and the slide (20) have substantially the same external covering (see page 8, lines 9-11; and page 11, lines 20 and 21).

Regarding claim 33, see comments for claim 1.

Regarding claim 34, Kallassy shows the second buffer (24) positioned adjacent to the second end and upon impact it produces a sound.

3. Claims 2 and 3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kallassy (WO 99/26705) in view of Tetreault (4,671,508).

Regarding claims 2 and 3, Kallassy shows the handle (12) and slide (20) are each provided with any suitable material or combination of materials, preferably using hard rubber or

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durable plastic. Kallassy does not expressly show the use of foam or leather to cover the handle portion. Tetreault shows a practice bat, wherein the handle portion (14) is wrapped with a flexible deformable tape such as leather, rubber or plastic (15). It would have been obvious in view of Tetreault to have used any of the above known material for the handle portion of Kallassy, since they are considered art recognized equivalents to improve the grip.

4. Claims 4 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kallassy (WO 99/26705) in view of Mollica (5,360,209) and Bratt (3,955,816), Alvarez (4,555,111) and Tetreault (4,671,508).

Regarding claims 4 and 14, Kallassy as disclosed above does not show the shaft to include weighted member. Kallassy shows the head (16) is weighted (see page 13, lines 18-28; and page 14, lines 1-8). However, Kallassy does not indicate if the weight is variable. Mollica shows a batting swing trainer (10) comprising: a shaft (22) having a substantially uniform circumference and first and second ends, and variable weight means slidably positioned over the shaft. Brat shows a warm-up bat having a handle and a hollow chamber (12), wherein weight (18) can be received within the hollow chamber (head portion), and the amount of weight can readily be adjusted by removing the plug (20). Alvarez also shows a practice bat having a handle portion (24), a shaft (12) and a weighted head portion (16), wherein the length, width and weight of the head portion can be varied (see figures 2, 6 and 7). Tetreault, shows a weighted practice bat, wherein the slidable weight (16) is positioned within the hollow shaft of the training bat. It would have been obvious in view of the prior art of record to have included a variable weight

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means positioned in the hollow shaft or within the head portion for the training device of Kallassy, in order to accommodate various size players having various training needs.

5. Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kallassy (WO 99/26705) in view of Bratt (3,955,816).

Regarding claim 5, Kallassy teaches alternative handles (see page 12, lines 1-7). However, Kallassy does not expressly disclose that the handles are removable. To provide handles that are integral or releasably removed with respect to the shaft is well known in the sports art and demonstrated by Bratt. Bratt shows a warm-up bat wherein the bat has a series of different sized interchangeable handles which fasten and unfasten from the tubular section to permit access to the hollow chamber and to allow change to the effective size of the bat (see claim 4). It would have been obvious in view of Bratt to have provided the same for Kallassy's bat and/or club.

6. Claims 7, 10, 12, 16, 18, 24, 25, 26-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kallassy (WO 99/26705) in view of Official Notice.

Regarding claim 7, Kallassy shows the stopping means (22, or in the alternative 202) adapted to fit around the shaft (see figures 4 and 12), the first and second portions being secured to the shaft with fasteners (see page 12, lines 8-26). Kallassy does not show a two-piece stopping means. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have made the stopping means of Kallassy in two parts, since it has been held that constructing a formerly integral structure in various elements involves only routine skill



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in the art, and it would allow the stopping means to be put around the shaft more efficiently.

*Nerwin v. Erlichman*, 168 USPQ 177, 179.

Regarding claim 10, Kallassy does not expressly disclose the material used to make the stopping means. Plastic is a well-known material in the art. Official Notice is taken of such.

Regarding claim 12, Kallassy does not suggest the use of epoxy glue to secure the stopping means to the shaft, but suggests other means of attachment (see page 6, lines 12 and 13). The use of epoxy glue is well known in the securement art. Official Notice is taken of such.

Regarding claim 16, Kallassy in an alternative embodiment shows the head (330) is removably attached to the shaft (12; see page 13, lines 18-28). Kallassy does not expressly disclose that the head can be interchanged with heads of differing weights. However, it is well known in the practice and training art to alter the amount of weight in order to accommodate various size players.

Regarding claim 18, Kallassy in a first embodiment shows the head (16) to be secured to the shaft (12). To make the head an integral part of the shaft is well known, it is also well known to make the head and shaft of two parts that are connected together in a variety well known ways including the use of epoxy glue. Official Notice is taken of such.

Regarding claims 24 and 25, Kallassy does not expressly disclose the use of aluminum or metal alloy for the shaft and handle. However, the aforementioned materials are well recognized in the art, and it would have been obvious to use either one for the practice device of Kallassy. Official Notice is taken of such.

Regarding claims 26-32, Kallassy as disclosed above shows an apparatus and method of using a training device. The apparatus of Kallassy meets the structural limitations of the claimed

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invention. Kallassy teaches a person the proper technique for swinging a golf club, and extends the teaching method to include other sports, specifically Baseball. The steps being gripping the handle with one hand and gripping the slide with the other hand; and swinging the trainer while simultaneously moving the slide from the first position where it is adjacent to the second end to the second position where the slide is adjacent the stop; the person grips the handle adjacent to the stop; the person swings the club/bat head outwardly and away from the person's body; the person repeating the steps of swinging the trainer; holding the trainer with both hands similar to holding a conventional golf club/baseball bat, and swinging the club/bat in the same manner as a conventional club/bat, causing the slide to move along the shaft until it strikes the area of increased circumference of the second end of the shaft and emits an audible sound, whereby the person can determine the force of the swing. Kallassy may not recite the exact teaching, but one skilled in the art would have modified the method steps to accommodate a batting swing, and all of the above steps would have been inherent in that adaptation.

7. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kallassy (WO 99/26705) as applied to claim 13, and further in view of Bratt (3,955,816).

Kallassy as disclosed above does not indicate the amount of weight that is being used for training a player. Bratt as disclosed above also does not indicate the amount of weight that is added or subtracted to the hollow chamber, but teaches that the weight can be varied in order to achieve different size and weight combinations. It would have been obvious in view of Bratt to one having ordinary skill in the art at the time the invention was made to have adjusted the weight means of Kallassy in order to accommodate various size players with various training

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needs. It is further noted that applicant does not appear to assign any criticality for the claimed weight range.

***Response to Arguments***

8. Applicant's arguments, filed January 3, 2003, with respect to the rejection(s) of claim(s) 1-11, 13-34 are not persuasive. With reference to the Response to a Protest filed May 15, 2002. Applicant asserts that the Kallassy reference is not relevant prior art and does not include enabling teachings for baseball training and does not provide motivation for a skilled practitioner to combine the "slidable stop" of the Kallassy publication with any baseball swing training device. On the contrary, although Kallassy does not point out to a step-by-step process of using its training device for baseball or softball training, however, one skilled in the art would know not to use the same steps required to train a golfer, when training a baseball player. Furthermore, one skilled in the art would know that a golf club swing is different from a baseball bat swing, and would train accordingly.

Regarding the Mollica reference not showing the weighted and handle portion to have substantially the same diameter. On the contrary Mollica shows the weighted portion having a diameter substantially the same as the diameter of the handle. The definition of *substantially* is largely the same, and as best seen Mollica shows the weighted member to be substantially the same as the handle. Mollica additionally teaches that the generally cylindrical slide is made to resemble a "somewhat traditional baseball bat". This is considered to be a rather broad statement, since traditional baseball bats are made in various lengths and diameters to accommodate the end user, and since Mollica additionally teaches that the weight of the slide

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can be varied to accommodate the various needs of the individual batters. It would have been obvious to increase or decrease the length and/or the diameter of the slide in order to adjust the weight, since the aforementioned modification would work just as well.

Regarding the Mollica reference being silent on the subject of means positioned on the shaft adjacent to the handle for stopping movement of the slide in the direction of the handle. For a reference to be “silent” does not mean it teaches away from a feature, especially if the feature is well known, and may well indicate that the patentee thought the feature so conventional, as not to require comments.

Regarding the Kallassy reference describing a golf swing training device, and no enabling teaching regarding a baseball swing training. Again, Kallassy mainly focuses on a training device for a golf swing, but points out that the device can be also applied to other sports such as baseball. One skilled, for that matter one of ordinary skill in the art would know that the two sports are different, and require different training, hence different ways of swinging the device, for a “skilled” or “an ordinary skilled” person to apply the same golf methods to a baseball player would not be an obvious step, however, to alter the device and apply the “old and conventional” steps of swinging a bat would be an obvious step.

Regarding the remarks that Kallassy does not show a generally cylindrical handle or a generally cylindrical slidable grip. On page 12, lines 3-7, of Kallassy’s publication this feature is clearly taught. Having a cylindrical handle or a handle that conforms to the contour of a players fingers are both old and conventional, and as taught by Kallassy it can be made cylindrical in shape in order to avoid customizing the outer surface to fit various size hands.

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Regarding applicants continuous assertion that the golf swing steps can not be applied to a baseball swing, again as stated above one skilled or even one of ordinary skill in the art would not do so. Kallassy reference has outlined a device and steps for using it and indicates the device can be altered to be used for other sports; this means that the steps would also be altered to accommodate for instance a baseball player.

Regarding the Tetreault patent, this reference was used to demonstrate that the use of foam and/or leather is old and conventional to cover a handle.

Regarding the Bratt patent, this reference was merely used to show that it is well know to have series of different sized interchangeable handles.

Regarding the "appropriateness" of the Kallassy reference for training a baseball player. Once again, one skilled or one of ordinary skilled in the art would not apply the various steps for training a golfer to train a baseball player. One skilled or one of ordinary skilled in the art would apply the already well known and conventional steps to train the baseball player, therefore, applicants remarks regarding teaching away from bending the lower elbow is moot. There is nothing new and unobvious about placing both hands on the handle of a baseball bat or bending the elbow (at least initially as applicant has pointed out in their remarks; also clearly shown in the attachment provided by the applicant) when swinging a baseball. An artisan is not compelled to blindly follow the teaching of one prior art reference over another without the exercise of independent judgement. *Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889, 221 USPQ 1025, 1032 (Fed. Cir. 1984).

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***Conclusion***


9. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mitra Aryanpour whose telephone number is 703 308 3550. The examiner can normally be reached on Monday - Friday 9:00 to 5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Paul Sewell can be reached on 703 308 2126. The fax phone numbers for the organization where this application or proceeding is assigned are 703 308 7768 for regular communications and 703 305 3579 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703 308 1148.

MA  
11 March 2003

  
Paul T. Sewell  
Supervisory Patent Examiner  
Group 3700